

Decision 02-01-065

January 23, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into the operation of interruptible load programs offered by Pacific Gas & Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company and the effect of these programs on energy prices, other demand responsiveness programs, and the reliability of the electric system.

Rulemaking 00-10-002
(Filed October 5, 2000)

ORDER DENYING REHEARING OF DECISION 01-09-020**I. SUMMARY**

By this Order, the Commission denies rehearing of Decision 01-09-020 ("the Decision"). The Decision determined eligibility for Category M exemption status from rotating blackouts to customers of Pacific Gas & Electric, San Diego Gas & Electric and Southern California Edison based on public health and safety criteria. Dr. Lee R. Walker of Los Gatos Oral and Facial Surgery submitted an application for Category M status, but was not among those granted the exemption. Dr. Walker applies for rehearing of the Decision, alleging that he should have been granted exempt status because his application underreported the health and safety risks inherent in his business and claiming he was not treated the same as other similarly situated dental surgeons. We have carefully considered the allegations in Dr. Walker's application for rehearing, and conclude that the request for rehearing should be denied.

II. BACKGROUND

By D.01-05-089 (issued May 24, 2001) the Commission added Category M to the list of essential customers normally exempt from rotating outages. Category M was created to allow an additional exemption, as necessary to protect public health and

safety. Customers were required to submit an application seeking Category M status. Applicants were informed that the number of available exemptions would be severely limited. Applications were due no later than June 4, 2001. The Commission received 9,522 completed applications. Dr. Walker's application was timely submitted electronically using a Commission form on May 31, 2001. Due to the high volume of applications received, and in order to implement the Category M exemption before the Summer of 2001, an outside consultant was employed. The Commission retained Exponent to review the applications and to develop a methodology for determining which applicants should be recommended for the exemption.

Exponent's analysis and report were submitted to the Commission on August 9, 2001. Exponent developed a numeric risk index score based on self-reported information submitted by each applicant. Applicants were ranked according to the degree of risk to public health and safety if affected by a rotating power outage, based on the severity, likelihood and population affected. Exponent then made recommendations for the Category M exemptions. To rule out inherent limitations in relying solely on the risk index scores, the risk index scores of outlier applicants were adjusted to the 95 percent upper confidence limit of the 90th percentile for the applicant's business group, follow-up interviews were conducted with outlier applicants, and an impartial panel group was used.¹ Additional screening criteria were also applied to the top 2000 applicants in order to narrow the list to the 404 applicants recommended for the exemption.

The Draft Decision of Commissioner Wood was mailed to applicants on August 17, 2001 along with a copy of Exponent's report. The Decision adopted by the Commission was mailed on September 12, 2001. In deciding to grant or deny a Category M exemption, the Commission relied upon Exponent's analysis and report, the

¹ Outlier applicants were defined as those applicants receiving scores greater than four standard deviations from the mean for their peer group.

application and verification documents submitted by the applicant, and comments on the Draft Decision.

III. DISCUSSION

Dr. Walker advances two arguments in support of his application for rehearing. First, he states that the Decision was not based on true facts because his application contained factual errors that resulted in underestimated health and safety risks and an erroneous risk index score for his business. Dr. Walker contends that as a medical doctor performing oral and maxillofacial surgery in an on-site surgery center, using general anesthesia and electricity dependent equipment, the nature of his business inherently poses a significant health and safety risk, and an imminent danger to public health and safety. Second, he claims that he has not been treated equally under the law, inasmuch as similarly situated dental and surgery practices were granted exempt status. Each of these points is addressed below.

A. The Commission Did Not Commit Legal Error by Relying Upon Verified Information in the Applications.

Dr. Walker states that his initial application contained factual errors that underestimated the health and safety risks and resulted in an erroneous risk index score. (Application for Rehearing at p. 2.) He argues on rehearing that a rotating outage would present a significant and severe health and safety risk to his patients. (Application for Rehearing, p. 3.) In support, Dr. Walker points out that he performs oral surgery on-site, rather than at a local hospital, as some oral surgeons do, and his surgery center uses medical equipment, including monitors for patients undergoing general anesthesia, that is dependent upon an uninterrupted flow of electricity.

These arguments do not demonstrate legal error in the Decision, as we necessarily relied upon applicants' self-reported information, placing the burden upon the applicants to provide accurate information. (Decision at p. 4.) In this proceeding, the Commission was faced with the enormous administrative burden of evaluating 9,522 applications for the Category M exemption. Applicants were assigned a relative risk index score, based on the demonstrated risk to public health and safety and population

affected, as reported in the application. Only 404 applicants received the exemption. We concluded that Exponent applied a rational and objective methodology to determine the relative risk ranking, and its review of applications was thorough and complete.

(Decision at p. 10, 32.) Based on the information in his application, Dr. Walker's application did not demonstrate imminent danger to public health and safety, and resulted in a relative risk index score that was not among the top 2000.

The Commission made every effort to ensure that the information provided was accurate. Applicants were instructed that the determination of eligibility for the Category M exemption would be based on their ability to demonstrate that a rotating outage would present an imminent jeopardy or danger to public health and safety.

(Decision at p. 4.) The Application Instructions also indicated that applicants would not be allowed to correct applications once they were submitted. (Exponent Report, Appendix D.) A toll free telephone number was available for applicants to call with any questions. (Decision at p. 34.)

Finally, we note that notification procedures for reporting rotating outages are improving. The Independent System Operator and utilities are required to alert the public and the media of the time and location of anticipated blackouts. Customers may take the additional measure of registering with the State of California to receive individual notification by pagers or cell phones to mitigate any jeopardy to public health and safety. (Decision at p. 35-36.)

In light of the above considerations, we conclude that there is no basis for the Commission to grant rehearing, as Dr. Walker has not demonstrated legal error. Absent a showing of legal error on the part of the Commission, to allow an exception for one application to allow corrections or additional information, particularly after the Decision has been issued, would be unfair to the thousands of other unsuccessful applicants who did not attempt to correct their information in view of the Application Instructions prohibition on such correction.

B. There Was No Denial Of Equal Protection Because the Same Methodology Was Applied to All Applicants.

Dr. Walker argues that he did not receive equal treatment under the law, because other similarly situated business groups were granted Category M status, while his office was not. (Application for Rehearing at p. 2.) The fact that one applicant did not receive an exemption while others in the same peer group did, does not establish discriminatory or preferential treatment by the Commission. The methodology developed by Exponent was applied equally to all applications. The determination that an applicant was eligible for the exemption was not based on the business group category, but rather, based on the information contained in the individual application. (Decision, pp. 6-8.) The final determination of Category M eligibility was largely based on the relative risk index ranking, which in turn, relied upon the applicant's own information. The end result was that not all dentists and outpatient surgeons were granted Category M status, nor were, for example, all skilled nursing facilities or dialysis treatment centers. (D.01-09-020, pp. 17-18.) Because the same methodology was carefully applied in evaluating all applications, the decision was not based on any discriminatory classification but rather on the individual information supplied.

Under the Equal Protection Clause of the United States Constitution, similarly situated persons are required to be treated the same. (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439.) A threshold question in equal protection analysis is whether the state has adopted a classification which treats similarly situated individuals or groups in an unequal manner. (*People v. Long* (1999) 71 Cal.App.4th 1, 22.) Where there has been no such classification, equal protection analysis is not implicated. Here, there was no such classification. The methodology and risk assessment criteria were applied uniformly to all applicants, and Dr. Walker's application was evaluated on the same basis as other dentists and outpatient surgeons. Accordingly, we conclude that there is no violation of equal protection.

IV. CONCLUSION

For the reasons stated above, we find no legal error in the Decision. Therefore, the application for rehearing of Dr. Lee Walker is denied.

Therefore, **IT IS ORDERED** that:

1. Dr. Lee Walker's application for rehearing is denied.

This order is effective today.

Dated January 23, 2002 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners